Supreme Court, U.S.
F I L E D
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No.

In The
Supreme Court of the United States
October Term, 1993

GREGORY P. NOBLE, Sr.,

Petitioner,

v.

REGINALD WILKINSON, Director, Department of Rehabilitation & Corrections, State of Ohio,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dated: January 21, 1994

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QUESTIONS PRESENTED

1. Whether the failure of a state trial judge to conduct an inquiry of a criminal defendant sufficient to establish that the defendant understands the importance of having an attorney represent him, the risks of self-representation and is able to represent himself renders any waiver of trial counsel invalid under the Sixth Amendment.

2. Whether, if an accused has expressed dissatisfaction with his court-appointed attorney, the Sixth Amendment requires a state judge ascertain the reason for such dissatisfaction before a waiver of trial counsel can be valid.

3. Whether a defendant who is advised that he must either use an assigned attorney whom he believes to be conflicted or represent himself can be said to have waived his right to trial counsel under the Sixth Amendment.

Table of Contents

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
U.S. Const. Amend. VI	2
U.S. Const. Amend. XIV. Section 1	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS PERTINENT TO NOBLE'S LACK OF UNDERSTANDING OF HIS RIGHT TO COUNSEL	5
REASONS FOR GRANTING THE WRIT	10
I. THE SIXTH CIRCUIT'S INSTANT DECISION, WHICH EFFECTIVELY HOLDS THAT NO INQUIRY IS CONSTITUTIONALLY REQUIRED OF A STATE JUDGE BEFORE FINDING THAT THERE HAS BEEN A WAIVER OF COUNSEL, CONFLICTS WITH THE PRECEDENTS OF THIS COURT AND THE THIRD, FIFTH AND ELEVENTH CIRCUITS	12
II. THE SIXTH CIRCUIT'S DECISION UPHOLDING NOBLE'S WAIVER OF TRIAL COUNSEL DESPITE THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE REASONS FOR NOBLE'S EXPRESSED DISSATISFACTION WITH HIS COURT-APPOINTED ATTORNEY CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND THE PRECEDENTS OF THIS COURT	15
CONCLUSION	18

Table of Authorities

	Page(s)
Case Citations:	
Carnley v. Cochran, 369 U.S. 506 (1962)	10, 12, 18
Faretta v. California, 422 U.S. 806 (1975)	10, 12
Gilbert v. Lockhart, 930 F.2d 1356 (10th Cir. 1991)	17
Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) *cert. denied* 463 U.S. 1210 (1983)	13-14
Johnson v. Zerbst, 304 U.S. 458 (1938)	10, 12, 15, 17
McDowell v. United States, 484 U.S. 980 (1987)(White and Brennan, J.J., *dissenting*)	11, 14
Noble v. Wilkinson, No. 92-4121 (6th Cir. Oct. 27, 1993)	4 n.2
Ohio v. Noble, 56 Ohio St. 3d 711, 565 N.E. 834 (1991)	4
Ohio v. Noble, No. 88-L-13-203 (Ohio App. 11th Dist. July 9, 1990)	4, 7
Piankhy v. Cuyler, 703 F.2d 728 (3d Cir. 1983) ...	13, 15
Sanchez v. Mondragon, 858 F.2d 1462 (10th Cir. 1988)	17
Smith v. Lockhart, 923 F.2d 1314 (8th Cir. 1991) ..	16-17

Table of Authorities

	Page(s)
United States v. Bailey, 675 F.2d 1292 (D.C. Cir. 1982) *cert. denied sub nom. Walker v. United States*, 459 U.S. 853 (1982)	12, 14
United States v. Bohn, F.2d 720 (9th Cir. 1982)	17 n.3
United States v. Chaney, 662 F.2d 1148 (5th Cir. 1981)	13-14
United States v. Edwards, 716 F.2d 822 (11th Cir. 1983)	14
United States v. Hafen, 726 F.2d 21 (1st Cir. 1984) *cert. denied.* 466 U.S. 962 (1984)	14
United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982)	14
United States v. Tompkins, 623 F.2d 824 (2d Cir. 1980)	14
United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980)	14
United States v. Welty, 674 F.2d 185 (3d Cir. 1982)	13, 17
Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality opinion)	10-12, 17
Young v. Lockhart, 892 F.2d 1348 (8th Cir. 1989)	17

Table of Authorities

	Page(s)
Constitutional Citations:	
U.S. Const. Amend. VI	*passim*
U.S. Const. Amend. XIV, Section 1	*passim*
Statutory Citations:	
28 U.S.C. Section 1254(1)	2
28 U.S.C. Section 2241	2, 4
28 U.S.C. Section 2254	4

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GREGORY P. NOBLE, SR.,

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& Corrections, State of Ohio,

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Petition For A Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

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Petitioner Gregory P. Noble, Sr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 27, 1993, which affirmed the denial of a writ of habeas corpus, sought upon petitioner's alleged invalid waiver of trial counsel.

OPINIONS BELOW

The unreported opinion of the Sixth Circuit affirming the denial, by the United States District Court for the Northern District of Ohio, of the petition for a writ of habeas corpus is reprinted at pages 1a-3a.[1] The unreported district court's order, granting petitioner a certificate of probable cause to appeal is

[1]References in the form "a " are to the appendix to this petition.

reprinted at page 4a. The unreported opinion and order of the district court, denying the petition for a writ of habeas corpus is reprinted at pages 5a-11a. The unreported report and recommendation of the magistrate judge of the United States District Court for the Northern District of Ohio, recommending the denial of a writ of habeas corpus, is reprinted at pages 12a-33a.

The reported decision of the Supreme Court of Ohio, denying Noble's motion to invoke its jurisdiction to review the judgment affirming his conviction, appears at 56 Ohio St.3d 711, 565 N.E.2d 834 (1991); it is reprinted at page 34a. The unreported majority opinion and decision of the Ohio Court of Appeals for the Eleventh District affirming Noble's conviction is reprinted at pages 35a-47a. The unreported concurring opinion of said court is reprinted at pages 48a-50a. The transcript of the colloquy between Noble and the trial judge of the Ohio Court of Common Pleas for Lake County, upon which it apparently found that Noble had waived trial counsel, appears at pages 51a-55a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2241(a). The judgment of the Sixth Circuit was entered on October 27, 1993.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In an unrecorded pre-trial conference presided over by a referee, Noble sought to have assigned trial counsel replaced because of a conflict of interest. The referee denied Noble's application and advised him that he could either represent himself or have assigned counsel. Thereafter during a terse colloquy several days later with the trial judge, which is reproduced in full at 51a-55a, he was held to have waived counsel, but was offered the stand-by assistance of the attorney he sought to have replaced.

Noble thereafter went to trial, representing himself with the aid of said assigned counsel and was found guilty by a jury of felonious assault, having a weapon while under a disability, and unlawful possession of a dangerous ordnance. He received an indeterminate sentence of six to fifteen years, which he is currently serving. On appeal, Noble argued, among other things, that his waiver of trial counsel was unconstitutional. The Ohio Court of Appeals for the Eleventh District affirmed

his conviction. *Ohio v. Noble*, Lake App. No. 88-L-13-203 (July 9, 1990) (35a-50a). The Supreme Court of Ohio denied Noble's motion to invoke its jurisdiction to review his conviction. *Ohio v. Noble*, 56 Ohio St.3d 711, 565 N.E.2d 834 (1991)(34a).[2]

On March 23, 1992, Noble petitioned the United States District Court for the Northern District of Ohio for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2254. Jurisdiction was based upon 28 U.S.C. Section 2241.

Noble attacked the constitutionality of his conviction on the ground that it had been obtained in violation of his Sixth Amendment right to counsel. Noble averred that his waiver of trial counsel was not knowing and intelligent because he had neither been aware nor advised of the rights that he would be giving up when waiving. Noble also averred that his waiver was constitutionally infirm because it was the product of erroneous advice given by the trial court, instructing him that he would either have to represent himself at trial or accept the representation of a court-appointed attorney whom he had good cause to believe was disloyal.

The District Court filed an opinion and order dismissing Noble's petition on the merits. *Noble v. Wilkinson*, No. 1:92CV0603 (N.D.Oh. Sept. 15, 1992)(5a-11a). It thereafter granted Noble a certificate of probable cause to appeal. *Id.* (Dec. 18, 1992) (4a). The Sixth Circuit affirmed. *Noble v. Wilkinson*, No. 92-4121 slip op. at 4, (6th Cir. Oct. 27, 1993)(3a).

Noble here seeks review of the Sixth Circuit's decision.

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[2]The Sixth Circuit held that Noble had exhausted his State remedies. *Noble v. Wilkinson*, No. 92-4121 slip op. at 2, at 2a (6th Cir. Oct. 27, 1993).

STATEMENT OF FACTS PERTINENT TO NOBLE'S LACK OF UNDERSTANDING OF HIS RIGHT TO COUNSEL

Following his indictment, Noble retained counsel, who was permitted to withdraw because of an alleged conflict of interest. As Noble had exhausted his funds, new counsel was assigned. However, this attorney was also permitted to withdraw because of a conflict. Another attorney, Edward C. Powers, Esq., was assigned. Noble recognized Powers as a former state prosecutor who, some years earlier, had prosecuted an individual for murder. That individual was tried three times and finally acquitted. Noble was a key defense witness and was threatened by Powers and his co-prosecutor.

Noble promptly sought replacement of Powers because of his concern that Powers would not give him effective representation, but would use this assignment as a way of getting even with Noble. Noble was told by the trial judge's law clerk, who served as the referee for this conference, that he could not have another assigned counsel. He could either go it alone or stay with Powers.

Although there was no transcript of that conference, Noble's 1989 brief on direct appeal from his conviction contained the following respecting a pre-trial conference at which he sought, but was denied, a replacement attorney for Mr. Powers:

> On September 8, 1988, a pretrial hearing was held before Referee Ken Roll with participation by Assistant Prosecutor Brett Plassard, Edward C. Powers, and GREGORY P. NOBLE, SR. GREGORY P. NOBLE, SR. indicated he desired new counsel appointed due to a conflict between GREGORY P. NOBLE, SR. and Edward C. Powers.

> In Lake County Court of Common Pleas Case No. 82-CR-445, *State of Ohio v. Michael C. Baker*, Michael Baker was charged with attempted murder. GREGORY P. NOBLE, SR. was the chief defense witness in the matter which was tried three (3) times due to the jury failing to reach a verdict in the first two (2) trials. The first trial concluded on December 15, 1982 and the second concluded on February 3, 1983. In a Judgment Entry filed on April 1, 1983, Michael C. Baker was found "Not Guilty" of all charges.
>
> The third trial involving Michael C. Baker was tried by Assistant Prosecutors Judd Hawkins and Edward C. Powers. GREGORY P. NOBLE, SR. was the key witness for the defense and there were confrontations inside and outside the courtroom between Assistant Prosecutors and GREGORY P. NOBLE, SR. These confrontations included threats by the prosecution that if GREGORY P. NOBLE, SR. did not testify in the manner the prosecution desired, he would face felony charges.
>
> Referee Roll indicated to GREGORY P. NOBLE, SR. he was not entitled to substitute counsel and GREGORY P. NOBLE, SR. indicated it would be necessary for him to represent himself.

The prosecution's brief in opposition to Noble's direct appeal did not contradict the foregoing quoted material. It was silent on this point and was taken as an admission by the Ohio Court of Appeals, which recited the relevant facts in its opinion, filed on July 9, 1990:

> On September 8, 1988, a pretrial hearing was held before a referee from the Lake County Common Pleas Court, at which time the appellant

> [Noble] indicated he desired yet another new attorney because of a conflict with Edward C. Powers. The referee denied the appellant's [Noble's] request.

Ohio v. Noble, Lake App. No. 88-L-13-203 (July 9, 1990)(37a). Although it denied habeas corpus, the district court accepted the state court record as true, despite an attempt by the state attorney general to contradict it with various affidavits (8a-9a).

Noble, with Powers at his side, thereafter appeared before the trial court. After a colloquy which could not have taken more than two minutes, Noble's waiver of counsel was accepted (51a-55a). The significant aspects of the colloquy follow.

The trial judge began by telling Noble that he had "been advised" "that you wish to represent yourself in this matter". Noble responded, "That's correct, Your Honor."

The trial judge did not state the source of his information or what other information, if any, had been provided to him on this topic. The trial judge did not ask Noble why he wished to represent himself or whether and, if so, why he was dissatisfied with Mr. Powers, his court-appointed attorney. Such an inquiry would have clearly revealed the conflict between Noble and Powers and resulted in the appointment of new counsel, so as to avoid even the appearance of impropriety.

Upon hearing that Noble wanted to represent himself, the trial judge stated:

> "You understand that you have the right to an attorney and the Court has appointed you other attorneys and Mr. Powers is here ready to go forward and you wish to go forward."

Noble responded, "I understand, Your Honor." The trial judge conducted no inquiry as to the extent of Noble's understanding.

It was untrue that other attorneys had been appointed. While Mr. Powers was Noble's third attorney, only one previous attorney had been assigned. Noble had retained his first attorney, who was permitted to withdraw because of a conflict-- his partner's wife was employed by the trial judge. The Public Defender was then appointed, but was permitted to withdraw because of a conflict-- he represented an alleged victim. Thus, Mr. Powers was the second assigned counsel.

The trial judge's mistake is significant here. Noble was entitled to the appointment of an attorney who was not conflicted. Thus, it is unimportant how many attorneys had either been retained or appointed. Noble had done nothing to cause his first two attorneys to be permitted to withdraw on their own motions. Nevertheless, the trial judge seemed annoyed or impatient. It may be that he had concluded that Noble was attempting to stall or manipulate the system. This misconception appears to have been reenforced by the comments of the prosecutor, suggesting that the question of representation "is nothing more than a gambit...."

The transcript preceding the execution of the written form of waiver of counsel contains no warning to Noble of the dangers and pitfalls of self-representation and no inquiry to determine whether Noble had any understanding of the applicable law, the nature of the charges, the possible punishment, the possible defenses or mitigating circumstances, the rules of evidence, or any of the myriad of matters this Court has held that one should know before he can be found to have made an intelligent and knowing waiver.

The trial judge's failure to inform Noble of possible punishment if convicted was significant here. Noble had been offered a plea bargain that if timely accepted would have resulted in

only one year of imprisonment. On the day of trial, Noble attempted to accept this plea offer, but it had been increased to three years. If the trial judge had advised Noble that he could face fifteen years of incarceration if convicted, he might have insisted upon the representation of a court-appointed attorney at trial.

Upon hearing that Noble wanted to represent himself, the trial judge, without exploring his reasons or why he was dissatisfied with his assigned counsel, told Noble:

> "Mr. Powers will sit with you at the counsel table and assist you in whatever way he can. However, it is going to be up to you to voir dire the jury, ask and cross-examine all the witnesses; do you understand?"

Noble responded, not by indicating an understanding, but by asking:

> "can we co-cross-examine the witnesses because I don't want to cross-examine professional police or expert witnesses?"

After eliciting the prosecution's view, the trial judge replied,

> "The court will permit, within reason and within the Court's latitude, the examination by Mr. Powers, but you [Mr. Noble] will be the one to examine to begin with, unless you defer them to Mr. Powers."

Noble's non-responsive reply was, "Thank you, Your Honor."

The remaining few words before the written waiver form was signed and the waiver was accepted by the court were merely matters of housekeeping-- namely, how Noble would invoke Mr. Powers' services at trial and Noble's desire to accept a previous plea offer. Thus, the trial judge cannot be said

to have made any inquiry into his knowledge or understanding of his right to counsel. The trial went forward with Noble and Powers defending.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve an apparent conflict or at least a substantial uncertainty among the Circuits respecting the extent and nature of the inquiry which must be made by a state trial judge, as a constitutional matter, before determining that a defendant has waived his right to counsel. Certiorari should also be granted to halt the erosion of the "protecting duty" that this Court has long imposed upon state trial judges to ensure that waivers of trial counsel are knowing, intentional and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)(plurality opinion); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Carnley v. Cochran*, 369 U.S. 506, 515 (1962).

Here, Noble appeared before the trial judge with assigned counsel and acknowledged that he wanted to represent himself. The trial judge did not even ask "Why?".

This Court has held:

> . . . this protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive his right does not automatically end the judge's responsibility. To be valid such waiver must be made with an

> apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 723 (1948)(plurality opinion).

The First, Second, Sixth, Seventh, Ninth and D.C. Circuits hold that there is no constitutionally mandated inquiry imposed upon state courts. They permit a determination from the record as a whole as to whether a state criminal defendant has validly waived counsel. The instant case takes the extreme position, no meaningful inquiry having been made, and effectively rejects *Von Moltke*, holding (2a):

> a deliberate and searching inquiry by the state court into the reasons for a defendant's decision to represent himself is not required.

In contrast, the Third, Fifth and Eleventh Circuits, although not requiring that a particular set of questions be asked and satisfactory answers obtained, hold that there must be some warning of the risks of self-representation and a minimal inquiry by the trial judge coupled with a record demonstrating the waiver.

The confusion respecting the nature of the inquiry required for the determination of a waiver and whether it is of constitutional magnitude or merely the application of the federal courts' supervisory powers, permeates both state and federal prosecutions. It caused Justice White, joined by Justice Brennan, to dissent from the denial of certiorari in *McDowell v. United States*, 484 U.S. 980 (1987), as follows:

> [s]ince *Faretta [v. California*, 422 U.S. 806 (1975)], lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when "knowing and intelligent" and "with eyes open."
>
> * * *
>
> Because a conflict among the lower courts has emerged concerning the proper application and interpretation of our decision in Faretta, I would grant certiorari. . . .

The D.C. Circuit has found that the uncertainty over the proper application and interpretation of *Faretta*, which concerned Justices White and Brennan, has diluted the standard for waiving counsel announced in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982) *cert. denied sub nom. Walker v. United States*, 459 U.S. 853 (1982).

I.

THE SIXTH CIRCUIT'S INSTANT DECISION, WHICH EFFECTIVELY HOLDS THAT NO INQUIRY IS CONSTITUTIONALLY REQUIRED OF A STATE JUDGE BEFORE FINDING THAT THERE HAS BEEN A WAIVER OF COUNSEL, CONFLICTS WITH THE PRECEDENTS OF THIS COURT AND THE THIRD, FIFTH AND ELEVENTH CIRCUITS.

First, petitioner believes that this Court's decisions in *Johnson v. Zerbst*, *id.*; *Von Moltke v. Gillies*, *id.*; *Carnley v. Cochran*, *id.*; and *Faretta v. California*, *id.*, require some form of inquiry and advice by the court before a waiver can be found.

Second, the Third, Fifth and Eleventh Circuits so hold. *Piankhy v. Cuyler*, 703 F.2d 728 (3d Cir. 1983); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *Hance v. Zant*, 696 F.2d 940, 949 (11th Cir. 1983) *cert. denied* 463 U.S. 1210 (1983); *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981).

Piankhy v. Cuyler, 703 F.2d 728 (3d Cir. 1983), reversed the denial of a writ of habeas corpus on facts strikingly similar to those here. Piankhy had on his own sought the representation of the Public Defender, but was denied because he was financially ineligible. He then represented himself at trial. The Third Circuit held that the state trial judge's failure to make an adequate investigation before finding that Piankhy had waived was constitutionally deficient. In doing so, it extended its holding in *United States v. Welty*, 674 F.2d 185 (3d Cir. 1982), a direct appeal case. *Welty* held that the Constitution, not merely the court's supervisory powers, required an investigation by the trial judge before finding a waiver of trial counsel (674 F.2d at 189):

> ... a defendant's waiver of counsel can be deemed effective only where the district court judge has made a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary.

The *Piankhy* court reversed, directing that habeas corpus be granted, because (703 F.2d at 731):

> The trial court failed, however, to inform Piankhy of his right to a court-appointed attorney if he could not afford one. That omission is significant in light of Piankhy's attempt to seek representation by the Berks County Public Defender his only source of public representation. Having been previously turned down by that office, Piankhy may not have understood that he had a right, under Pennsylvania

> law, to court-appointed counsel if he was otherwise unable to obtain an attorney.

Accord Hance v. Zant, 696 F.2d 940, 949 (11th Cir. 1983) *cert. denied* 463 U.S. 1210 (1983)("a trial judge must conduct a waiver hearing to make sure that the accused understands the dangers and disadvantages of proceeding pro se").

Although they are direct appeals from federal convictions, *United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) and *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981) hold that the Constitution, not merely the federal courts' supervisory powers, mandate a judicial inquiry before accepting a waiver of trial counsel. Petitioner recognizes that neither *Edwards* nor *Chaney* explicitly stated that their holding respecting the investigation rested on constitutional grounds; however, their silence compels that conclusion. *See* Justice White's dissent in *McDowell*, 484 U.S. at 980, which interpreted *Edwards* and *Chaney* as constitutional decisions.

The Sixth Circuit's holding that no inquiry is mandated to establish a constitutionally valid waiver of trial counsel is in accord with the First, Second, Seventh, Ninth and D.C. Circuits. *See United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982) *cert. denied sub nom. Walker v. United States*, 459 U.S. 853 (1982); *United States v. Hafen*, 726 F.2d 21, 25 (1st Cir. 1984) *cert. denied* 466 U.S. 962 (1984); *United States v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980); *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982). Thus, there is a significant and long standing conflict among the Circuits that should be resolved.

Here, the state trial judge's failure to conduct any significant inquiry of Noble before accepting his waiver of his right to trial counsel rendered the waiver constitutionally infirm. Noble was offered a plea bargain that would have resulted in one

year of imprisonment, which offer was later raised to three years. Instead, he received a fifteen year sentence. If Noble had been advised that his exposure if convicted was fifteen years of incarceration, he might have insisted upon court-appointed representation. Moreover, as in *Piankhy v. Cuyler*, 703 F.2d 728 (3d Cir. 1983), if Noble had been advised that he had an absolute right to a court-appointed attorney free of animus toward him, he would not have elected to represent himself.

Accordingly, Noble's waiver was not "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This Court should grant certiorari and reverse.

II.

THE SIXTH CIRCUIT'S DECISION UPHOLDING NOBLE'S WAIVER OF TRIAL COUNSEL DESPITE THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE REASONS FOR NOBLE'S EXPRESSED DISSATISFACTION WITH HIS COURT-APPOINTED ATTORNEY CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND THE PRECEDENTS OF THIS COURT.

The record plainly established that Noble was dissatisfied with Mr. Powers, his court-appointed attorney, for good cause. The trial court's failure to conduct an inquiry deprived Noble of an opportunity to present this clear conflict with Powers.

The record shows that Noble requested substitute counsel at a pre-trial hearing before a referee but his request was denied; the referee advised Noble that he could either have Mr. Powers or go it alone. The trial court never made any inquiry into Noble's reasons for his dissatisfaction with Mr. Powers; nor did the trial court offer substitute counsel. As matters stood, Noble

had an attorney whom he could not trust. It may have been for this reason that he passed up the plea offers.

Despite the absence of any inquiry into the reasons for Noble's dissatisfaction with his court-appointed attorney and the referee's erroneous advice to him that his only choice was representation by Mr. Powers or proceeding *pro se*, the Sixth Circuit upheld the validity of Noble's waiver. This holding conflicts with decisions of the Third, Seventh, Eighth, Ninth and Tenth Circuits. The Sixth Circuit's holding also conflicts with the precedents of this Court.

Smith v. Lockhart, 923 F.2d 1314, 1321 (8th Cir. 1991), is illustrative of the marked departure the Sixth Circuit's decision is from the decisions of other United States Courts of Appeals. *Smith* granted a writ of habeas corpus to a state prisoner because he proceeded *pro se* when confronted with the option of self-representation or representation by a conflicted court-appointed attorney. *Smith* held:

> Courts have long recognized that the Sixth Amendment contains a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties. Counsel must be willing "to advocate fearlessly and effectively" on behalf of the client. Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties and can include situations in which the caliber of an attorney's services "may be substantially diluted."
>
> When a defendant raises a seemingly substantial complaint about counsel, the judge "has an

> obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction." The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern. That inquiry should appear on the record.

923 F.2d at 1320 (citations omitted). *See also Gilbert v. Lockhart*, 930 F.2d 1356, 1360 (10th Cir. 1991)("defendant did not knowingly and intelligently waive his right to counsel when his motion for substitute counsel was denied and he was faced with the option of proceeding with unwanted counsel or pro se"); *Sanchez v. Mondragon*, 858 F.2d 1462, 1466 (10th Cir. 1988)(citation omitted)("A choice 'between incompetent or unprepared counsel and appearing pro se' is 'a dilemma of constitutional magnitude'"); *Young v. Lockhart*, 892 F.2d 1348, 1352 (8th Cir. 1989)(where state habeas prisoner was forced to accept the representation of an attorney who had represented him on a previous charge that resulted in conviction or proceed *pro se*, his waiver was invalid); *United States v. Welty*, 674 F.2d 185, 187-88 (3d Cir. 1982)("Where, on the eve of trial, a defendant seeks new trial counsel or opts to represent himself, the district court must engage in two lines on inquiry"; it must inquire into defendant's reasons for wanting substitute counsel and if good cause is lacking, his understanding of his right to counsel before accepting a waiver of counsel).[3]

Moreover, the Sixth Circuit's decision also conflicts with this Court's precedents. Noble could not have "knowingly and intelligently" waived his right to counsel where he was advised that he could either go it alone or accept the representation of a court-appointed attorney who he could have justifiably believed to be disloyal. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 723

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[3]Moreover, when a trial court has erroneously advised an accused of the scope of his right to counsel, any waiver based on that advice is invalid. *See, e.g., United States v. Bohn*, 890 F.2d 1079, 1082 (9th Cir. 1989). The Sixth Circuit's decision conflicts with this Ninth Circuit decision. Here, the trial court erroneously advised Noble that he was not entitled to substitute counsel.

(1948)(plurality opinion); *Carnley v. Cochran*, 369 U.S. 506, 515 (1962).

The trial court's failure to inquire into Noble's dissatisfaction with his conflicted court-appointed attorney, Mr. Powers, and its requirement that Noble either accept the services of Powers or proceed *pro se*, rendered his waiver constitutionally infirm. This Court should grant certiorari and reverse.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 27, 1993.

Respectfully submitted,

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